November 30, 2015

The Honorable Robert Goodlatte
Chairman
House Judiciary Committee

The Honorable John Conyers
Ranking Member
House Judiciary Committee

The Honorable Charles Grassley
Chairman
Senate Judiciary Committee

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee

Dear Chairmen Goodlatte and Grassley and Ranking Members Conyers and Leahy:

The Electronic Communications Privacy Act (ECPA), which was enacted in 1986, makes distinctions that simply don't comport with users' reasonable expectations of privacy in 2015. An email - for example - may receive more robust privacy protections under ECPA depending on how old it is, whether it is in an opened or unopened state, or even where it is stored. As a result, the government maintains the ability in many cases to compel Internet companies to disclose the contents of users' communications with a mere subpoena (as opposed to a warrant).

Last year, legislation that would codify a warrant-for-content standard was effectively blocked by a single agency: the Securities and Exchange Commission (SEC), despite having the support of 273 House Members and a broad array of companies and civil society groups that span the political spectrum. The SEC is continuing to lead the charge in objecting to legislation that would require the government to obtain search warrants before it can compel service providers to disclose the contents of users' communications.

As the target of an SEC investigation, I know that the SEC has a broad array of tools at their disposal to obtain information directly from targets. There is no evidence to suggest that these tools are insufficient. Indeed, in its most recent annual report, the SEC notes that it "brought a record number of cutting edge enforcement actions" and "continued to bring new and innovative approaches to widen its enforcement footprint and deter wrongdoers".

Nevertheless, the SEC is insisting that Congress create a new mechanism that would ultimately allow it to bypass the targets of investigations and demand that Internet companies turn over sensitive information entrusted to them on something less than a warrant. The SEC's prescription is simply bad public policy. It not only is inconsistent with consumers' reasonable expectation of privacy in 2015, but it violates the Fourth Amendment.

As you know, the Email Privacy Act (H.R. 699, sponsored by Representatives Yoder (R-KS) and Polis (D-CO), is now cosponsored by 304 Members of the House of Representatives. The Email Privacy Act has more cosponsors than any bill in the House of Representatives. The Senate companion bill - the Electronic Communications Privacy Act Amendments of 2015 (S. 356), introduced by Senators Lee (R-UT) and Leahy (D-VT), is cosponsored by nearly a quarter of the Senate. Both of these measures would codify a warrant-for-content standard without creating special carve-outs for regulatory agencies like the SEC, and both would pass overwhelmingly if you simply scheduled these bills for consideration in your Committees.

I urge you to reject the SEC's entreaties and move expeditiously to enact pass the Yoder-Polis and Lee-Leahy bills, which will bring our electronic privacy laws in line with the Fourth Amendment.

Sincerely,

Mark Cuban